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IN THE

Supreme Court of the United States

MARK J. SHERIFF, ET AL.,
Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS PAMELA GILLIE AND HAZEL MEADOWS

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QUESTIONS PRESENTED

The Fair Debt Collection Practices Act ("FDCPA") protects consumers from deceptive and abusive debt collection practices. The Ohio Attorney General contracts with private debt collectors—called "collections special counsel"—to assist in the collection of consumer debt. They are not the Attorney General's employees, but lawyers in private law firms, with their own office space and other clients.

The questions presented are as follows:

1. Was the court of appeals correct in rejecting the argument that debt collectors are exempt from all the FDCPA's restrictions whenever their client is a public entity, on the theory that that makes them "officers" of the State of Ohio within the meaning of the FDCPA, 15 U.S.C. § 1692a(6)(C)?

2. The Act states that it "is a violation" when a debt collector "simulates ... a document ... issued ... by" a state official, 15 U.S.C. § 1692e(9), or "use[s] ... any ... organization name other than the true name of [her own] business," *id.* § 1692e(14). Was the court of appeals correct in concluding that debt collectors violate the Act when they write dunning letters on Ohio Attorney General letterhead?

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INTRODUCTION[1]

Like many businesses, the State of Ohio enlists debt collectors from the private market to collect debts from consumers who buy goods or services from a state enterprise. Ohio's Attorney General engages these "collections special counsel" solely by contract, and they perform services "solely on an independent contractor basis." JA 173. The contracts disclaim any employment relationship. They require collections special counsel to pay out of pocket for their own office space, expenses, and employees. They prohibit special counsel from using the Attorney General's logo on business cards. These debt collectors typically perform the same services for other creditors. The only way collections special counsel get paid is by pocketing as much as a third of any debt they collect.

In enacting the Fair Debt Collection Practices Act, Congress recognized that outside debt collectors with these sorts of arrangements are prone to "egregious collection practices" because they are not restrained by a creditor's "desire to protect [its] [own] goodwill" and are paid only on commission. S. Rep. No. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Thus, the Act applies broadly to outside debt collectors, but in two nearly

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[1] The brief filed by Petitioners Ohio Attorney General and Mark and Sarah Sheriff and their firm is cited as "Pet. Br." The brief filed by Eric A. Jones and his firm (formally Respondents, but aligned with Petitioners) is cited as "Jones Br." For ease of reference, Gillie and Meadows are referred to as "Respondents" and the Jones parties as "Jones." Unless otherwise indicated, citations to statutory provisions are to 15 U.S.C.

identical and neighboring provisions, it exempts any "officer or employee" of a private business, and any "officer or employee" of a State, who collects debts as part of her "official duties." § 1692a(6)(A), (C). The Ohio Attorney General originally recognized that collections special counsel fall on the outside-debt-collector side of this divide: He contractually requires them to comply with the FDCPA. JA 162-63.

But now that collections special counsel have been accused of violating the FDCPA, the Attorney General has had second thoughts—lots of them. Now collections special counsel are officers of the State of Ohio, notwithstanding the carefully worded contracts that say otherwise—which means that they remain free to engage in all manner of abusive practices whenever their client is a public enterprise. Now it threatens Ohio's sovereignty to hold collections special counsel to the FDCPA's minimum standards of conduct, even though the Attorney General has long required them to do so by contract.

The Attorney General was right the first time, as the court of appeals correctly held. Outside debt collectors do not become "officers" of the State of Ohio just because the creditor for a particular debt happens to be a public enterprise.

On the merits, Petitioners draw a similarly untenable distinction between the letters debt collectors write for private versus public entities. Petitioners conceded that an outside debt collector who sends a dunning letter on IBM's letterhead violates the Act, even if IBM authorizes it. They had to

because that conduct falls squarely within the prohibition declaring it "is a violation" of the Act when an outside debt collector "use[s] ... any ... organization name other than the true name of [their own] business." § 1692e(14). Yet, somehow, Petitioners claim, the result is different when they do the same on Ohio Attorney General letterhead.

The Act draws no such distinction. In fact, the conduct here is even worse, because a dunning letter on Attorney General letterhead also "simulates ... a document ... issued ... by" a state official. § 1692e(9). The conduct here violates both provisions because collections special counsel are not the Attorney General or his office.

The State nevertheless protests that it is not materially misleading when a debt collector uses the Attorney General's letterhead with authorization. But when Congress announces that conduct "is a violation," a court is not free to carve out an exception because it concludes that the result does not advance Congress's objectives. In any event, Petitioners made another concession that dooms their position: The reason Petitioners want debt collectors to use the Ohio Attorney General's letterhead is "to get the debtor to prefer the debt with the state over and above his other debts." JA 416-17. So the letterhead *does* affect debtor conduct. The impression the debt collectors foster is misleading: There are many reasons why a particular consumer should not prefer a debt to some public entity over, say, rent or car payments.

This Court should affirm.

STATEMENT OF THE CASE

Congress Enacted The FDCPA To Eliminate Abusive Practices By Outside Debt Collectors

Congress enacted the FDCPA to "eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). The Act prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," and enumerates various practices that are per se misleading. § 1692e. It also prohibits debt collectors from engaging in a variety of other abusive practices, such as threatening imprisonment, § 1692e(4), and incessant phoning "with intent to annoy, abuse, or harass," § 1692d(5). The Act imposes civil liability for violations. § 1692k.

The Act does not exempt debt collectors who collect debts on behalf of a state-owned enterprise. Even so, Congress limited the scope of the Act in two significant respects. The Act applies only to consumer debt, § 1692a(5)—i.e., situations where a business (whether it be state owned or privately owned) enters the marketplace to sell goods or services to consumers. Tax debts are not covered. Nor are commercial debts.

The Act also applies only to *outside* debt collectors—those who regularly collect "debt[s] owed ... *another*." § 1692a(6) (emphasis added). Congress

regulated outside debt collectors for two reasons. First, "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2; Pet. App. 21a. Second, outside debt collectors are often paid only on commission—taking a significant cut of whatever they recover. They thus have every incentive to "press the boundaries of the Act's prohibitions on collection techniques." *Jerman*, 559 U.S. at 602; *see* S. Rep. No. 95-382, at 2 (outside debt collectors' commission-based pay incentivizes them to use "any means" to collect a debt); Pet. App. 21a. A creditor's own in-house personnel, by contrast, are subject to different incentives.

These two differences apply whether the creditor is a public entity or a private company. Therefore, the term "debt collector" does not include—and the Act does not apply to—"(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor" or "(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." § 1692a(6)(A),(C).

The Ohio Attorney General Contracts With Outside Debt Collectors To Collect Consumer Debts

1. In Ohio, debts owed to state entities that are 45 days past due are "certif[ied] ... to the attorney

general." Ohio Rev. Code Ann. § 131.02(A). All certified debts are entered into an electronic database. JA 123. From the database, most debts are first forwarded to the Attorney General's "in-house collection staff." JA 124. If they do not succeed, the database forwards the debt to outside debt collection agencies called Third Party Vendors. JA 124, 330. Next in line are collections special counsel, where debts are forwarded "for further collection efforts." JA 124. Finally, if all else fails, the database forwards the debt to a distressed debt vendor. JA 125.

After the Third Party Vendors and before distressed debt vendors, "[t]he attorney general may appoint special counsel to represent the state in connection with all claims ... which are certified to the attorney general for collection." Ohio Rev. Code Ann. § 109.08. "Such special counsel shall be paid ... from funds collected by them in an amount approved by the attorney general." *Id.*

The Attorney General "appoint[s]" collections special counsel for one-year stints. JA 142. The "appointment" as collections special counsel "only become[s] effective upon execution of [the] Retention Agreement," JA 216, and "actions taken by special counsel are only authorized by and through the retention agreement and only for its duration," Pet. App. 23a. Even with a retention agreement in place, collections special counsel can act only on particular debts assigned to them.

2. The retention agreements emphasize that collections special counsel are separate from the Attorney General's office. "Special Counsel will render

services pursuant to this Retention Agreement as an independent contractor." JA 144. "Special Counsel ... shall not be regarded as in the employment of, or as an employee of, the Attorney General or any State Client," *id.*, and "no agency, employment, joint venture or partnership [is] created between the Parties," JA 163. Collections special counsel may "not print business cards using the Attorney General's logo." JA 144.

Likewise, collections special counsel work out of their own offices using their own equipment and staff, and are responsible for their own business expenses, including wages, insurance, and taxes. JA 144, 163-64. All work must be "conducted by employees of Special Counsel's law firm." JA 211. Ohio does not grant collections special counsel health care benefits and they do not participate in the Public Employees Retirement System. JA 121.

Consistent with the collection special counsel's status as outside contractors, the retention agreements also declare: "Special Counsel must comply with the standards of behavior set forth in ... the Fair Debt Collection Practices Act, 15 USC 1692 et seq." JA 162-63.

3. Ohio law dictates that "[t]he attorney general shall provide to the special counsel ... the official letterhead stationery of the attorney general," but only in connection with certain tax claims. Ohio Rev. Code Ann. § 109.08. "The special counsel shall use the letterhead stationery, but *only* in connection with the collection of such claims arising out of those taxes." *Id.* (emphasis added). Yet the Attorney

General "requires Special Counsel ... verbally or in writing, to use official letterhead stationery of the Ohio Attorney General for all collection activities regardless of whether they arise out of taxes," JA 119; *see* Pet. App. 24a (noting that use of Attorney General letterhead for non-tax debts is "contrary to Ohio's code").

"[T]he Attorney General's Office does not individually review and authorize each collection letter sent by Special Counsel on the official letterhead stationery of the Attorney General." JA 122.

4. Collections special counsel generally receive 33% of the first $25,000 collected on any claim or account, and are paid on a sliding scale for any amount collected above $25,000. JA 151. And unlike an "officer or employee," whom the Attorney General must "represent and defend ... in any civil action" at the State's expense, Ohio Rev. Code Ann. § 109.361, collections special counsel agree to "indemnify and hold the Attorney General and the State of Ohio harmless and immune" from all claims, including any "claims involving collection activities." JA 159. They also "shall bear all costs associated with defending the Attorney General and the State of Ohio against any such claims." *Id.*

Outside Debt Collectors Send Misleading Letters On Ohio Attorney General Letterhead

Petitioners Mark Sheriff and Eric A. Jones were appointed collections special counsel for fiscal year 2013. JA 206, 275. They entered into standard reten-

tion agreements with the Attorney General for a one-year period.

Jones sent Respondent Pamela Gillie a debt collection letter on Ohio Attorney General letterhead. Pet. App. 14a; JA 42. The letterhead bore the State of Ohio's seal and the words "Mike DeWine, Ohio Attorney General." Pet. App. 14a. The letter referred to a "medical claim" for an undisclosed creditor and stated "this is a communication from a debt collector." *Id.* (capitalization omitted). It directed Ms. Gillie to "call Denise Hall at Eric A. Jones, L.L.C. ... to make arrangements to pay this debt." The letter was signed by "Eric A. Jones, Outside Counsel for the Attorney General's Office." *Id.* (capitalization omitted).

Sarah Sheriff, an employee of Mark Sheriff's law firm, sent Respondent Hazel Meadows a similar collection letter, also on Ohio Attorney General letterhead. Pet. App. 17a. The letterhead bore the State of Ohio's seal and the words "Office of the Ohio Attorney General, Collections Enforcement Section." *Id.* The letter stated "[w]e are debt collectors" and "[p]er your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General." *Id.* The letter was signed, "Sarah Sheriff, Wiles, Boyle, Burkholder & Bringardner Co., LPA, ... Special Counsel to the Attorney General for the State of Ohio." *Id.* Ms. Sheriff was not, in fact, a collections special counsel. JA 46.

The letters intimidated both recipients and confused them—both as to the letters' provenance and

legal ramifications. Meadows attested that the letter "scared me because I thought that the Ohio Attorney General might charge me with a crime for not paying what he said I owed." JA 139. Gillie could not tell whether the letter was a scam, but if not she was "concerned that if ... I did not pay the money, the Attorney General might garnish my wages." JA 137. The Attorney General stipulated that consumers "frequently call Attorney General staff" in confusion upon receiving letters like these. JA 129.

The Proceedings Below

1. Gillie and Meadows brought a putative class action against the lawyers who sent these letters and their law firms. The complaint alleged that collections special counsel's use of Ohio Attorney General letterhead violated 15 U.S.C. § 1692e. JA 48, 51. The Ohio Attorney General intervened. The district court stayed discovery and any proceedings regarding class certification pending a decision on "two legal issues": (1) whether collections special counsel are debt collectors under the FDCPA; and (2) whether their use of Attorney General letterhead violates the FDCPA. Pet. App. 27a.

The district court granted summary judgment for the collections special counsel and their law firms on both issues. The court held that collections special counsel are not "debt collectors" and are instead state "officers" exempt from FDCPA coverage under § 1692a(6)(C). Pet. App. 84a-90a. The court ruled in the alternative that collections special counsel's use of the letterhead was not misleading under § 1692e. Pet. App. 90a-98a.

2. The Sixth Circuit reversed and remanded. The court held that collections special counsel are not "officers" of the State of Ohio. Invoking the definition of "officer" in the Dictionary Act, 1 U.S.C. § 1, the court held that collections special counsel are not "authorized by law" to perform any duties; instead, they are "authorized only by contract with the OAG." Pet. App. 33a. Likewise, there is no "legislatively designated" Office of the Special Counsel, and collections special counsel have no "authority to exercise sovereign powers." Pet. App. 35a-36a.

Turning to the second question presented, the court noted that § 1692e(9) & (14) were at a minimum "violated in the technical sense—Mike DeWine is not the true name of any Defendant, ... and the official letterhead certainly implied that the letter was issued by the OAG." Pet. App. 48a. But the court ultimately concluded that whether these violations were material to the "least sophisticated consumer," Pet. App. 46a, was a "mixed question of law and fact" best left to the jury. Pet. App. 50a-51a. The court thus remanded for further proceedings on the question whether the dunning letters at issue were false and misleading. *Id.*

Judge Sutton dissented. In his view, requiring collections special counsel to comply with the FDCPA, which Ohio affirmatively requires by contract, would improperly intrude upon state operations. Pet. App. 55a. The court denied rehearing en banc, with Judge Sutton again dissenting, joined by four other members of the court. Pet. App 1a, 7a.

SUMMARY OF ARGUMENT

I. The FDCPA reflects Congress's decision to hold outside debt collectors—as distinguished from in-house debt collectors—to uniform minimum standards of conduct. Had Congress intended a wholesale exemption for state-owned debt, it would have exempted state-owned debt from the definition of "debt" under § 1692a(5) or "any person collecting debt owned by a State" from the definition of "debt collector" under § 1692a(6). It did not.

Collections special counsel are not "officers" of the State of Ohio. Petitioners agree that in enacting the FDCPA, Congress embraced the historical understanding of the term "officer," which is set out in this Court's precedents and common law. Under that understanding, an officer is one who holds an office that is: (a) created by law, with duties prescribed by law, not by contract; and (b) permanent and continuing. Collections special counsel fail each required element.

Here, collections special counsel's duties are prescribed not by law, but by detailed retention agreements. Without a signed retention agreement, collections special counsel can perform no duties and exercise no power. Moreover, Petitioners concede that there is no "office of [the] special counsel" in Ohio, Pet. Br. 33, and collections special counsel perform no permanent duties that are entrusted to the office. Instead, collections special counsel are retained for one-year contracts that are "personal in nature," JA 171.

The same result obtains under the Dictionary Act, which defines an officer as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. That is just a pithy way of capturing the two key qualifications of an "officer" prescribed by this Court's precedents and common law.

Petitioners' various arguments for nevertheless treating collections special counsel as officers are meritless. First, this Court has never suggested that merely performing a sovereign function is sufficient to qualify as an officer. Second, as numerous courts have held, debt collectors and lawyers who pursue debts do not perform sovereign functions. They do not make, enforce, or interpret any law. Instead, they simply help the Ohio Attorney General collect state-owned debts. Indeed, the personnel Petitioners correctly maintain are officers confirm the two essential criteria: Their positions and duties are prescribed by law, and their offices are continuing and permanent, not personal.

Petitioners' resort to the clear-statement rule fails. The rule applies only where federal legislation threatens a radical readjustment of the federal-state balance. Here, the FDCPA imposes no such radical readjustment. It merely prohibits outside debt collectors from using unscrupulous methods when collecting consumer debts—regardless of who their client happens to be. If the Act's restrictions were a significant intrusion on state sovereignty, the Attorney General would not require collections special counsel to comply with the FDCPA by contract. And Petitioners' invitation to depart from existing principles is especially inapt where, as here, they extol the

FDCPA for "show[ing] a healthy respect for federalism." Pet. Br. 14.

II. The dunning letters that Sheriff and Jones sent to Respondents violate the plain terms of § 1692e(9) & (14). They falsely convey the "impression" that they were "issued by" the Attorney General, § 1692e(9), and they "use ... an[] ... organization name other than the true name of the debt collector's business," § 1692e(14). Sheriff and Jones are simply not the "Ohio Attorney General" and do not work at the "Office of the Ohio Attorney General."

That alone is sufficient to prove "a violation" of § 1692e(9) & (14). Contrary to Petitioners' contention, the FDCPA does not require additional proof that violations of § 1692e(1)-(16) are materially misleading to give rise to liability. Reflecting Congress's determination to bar certain deceptive practices outright, the statutory text makes plain that each enumerated act "is a violation" of the Act. Under those terms, a debt collector who engages in such conduct has violated the statute—period. A violation does not require proof of some additional, unrecited element.

In any event, the letters are materially misleading, or at least a jury could so find. As the Attorney General conceded below, they create a "sense of urgency" and encourage consumers to "prefer" state debts over others. Understandably so—if there is one thing an ordinary consumer knows about the Attorney General, it is that he is the chief law enforcement officer for the State. When he sends a letter

referencing an outstanding debt, a consumer could easily worry that failure to promptly pay will result in criminal sanctions or other severe penalties. Conceding this is false, Petitioners argue that preferring state debts is still rational because the State can garnish lottery winnings or state tax refunds. But few consumers are lottery winners and few expect imminent state tax refunds. And there may be all sorts of reasons not to prefer the University of Akron debt over your rent or car payments: The University of Akron cannot evict you or repossess your car.

Finally, any inquiry into whether the letters are misleading should be from the perspective of the "least sophisticated consumer." As the majority of circuits have recognized, that standard—rooted in nearly a century of consumer-protection jurisprudence—vindicates Congress's purpose of shielding even gullible consumers from deceptive debt collection practices.

ARGUMENT

I. Outside Debt Collectors Are Not Exempt From All The FDCPA's Prohibitions Whenever Their Client Happens To Be A Public Entity.

When Congress passed the FDCPA, debt collectors hired to collect other businesses' debts were a brutish and unscrupulous lot. They testified under oath to threatening targets with jail and impersonating police officers. *The Debt Collection Practices Act: Hearing Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking,*

Currency and Housing, 94th Cong. (1976), at 31-33. They lured targets out of their homes with lies like, "Your son has been in an automobile accident and both his legs have been cut off." *Id.* at 34. They reveled in "beating" debtors by calling "every 5 minutes throughout the entire work day." *Id.* at 31.

Congress responded by prohibiting debt collectors from "us[ing] any false, deceptive, or misleading representation," § 1692e, or from "engag[ing] in any conduct ... to harass, oppress, or abuse any person in connection with the collection of a debt," § 1692d. It prohibited, for example, "[t]he use or threat ... of violence," § 1692d(1), "[t]he use of obscene or profane language," § 1692d(2), and "engaging any person in telephone conversation repeatedly or continuously with intent to ... harass," § 1692d(5).

The basic thrust of Petitioners' argument is that "Congress did not intend for the FDCPA to regulate the collection of a debt owed to a State." Jones Br. 10-11, *see* Pet. Br. 25. Petitioners argue that Congress hid that intention in a clause that excludes "officers or employees ... of a State" from the definition of "debt collector." § 1692a(6)(C). If they are right, when a debt collector collects debts for any governmental entity, he is free to threaten, berate, abuse, lie, mislead, and otherwise harass his target, knowing that the target has little recourse.

Petitioners are mistaken. The FDCPA applies to outside debt collectors, including those who collect public debts. § I.A. Collections special counsel are not "officers" of the State of Ohio. § I.B. Petitioners cannot change the Act's meaning by invoking the

clear-statement rule, because the FDCPA does not override the traditional balance of federal and state powers—and in any event its meaning is clear. § I.C.

A. The FDCPA applies to outside debt collectors, including those who collect debts for public entities.

For reasons explained above (at 4-5), the FDCPA reflects Congress's decision to hold outside debt collectors—as distinguished from in-house debt collectors—to uniform minimum standards of conduct. Congress codified the distinction in the Act's language. Its prohibitions govern all "debt collectors," defined broadly to include "any person ... who regularly collects or attempts to collect ... debts owed or due ... *another*." § 1692a(6) (emphasis added). It then exempted in-house collectors from outside collectors in two almost identical exemptions—one for private entities and one for governmental entities. The Act does not cover "any officer or employee of a creditor" collecting the creditor's debts, § 1692a(6)(A), or "any officer or employee of the United States or any State" collecting debts "in the performance of his official duties," § 1692a(6)(C). Just as an outside debt collector could not claim to be FDCPA-exempt by insisting he is an "officer" of a company (which would mean the FDCPA applies to no one), an outside debt collector cannot claim to be FDCPA-exempt by insisting he is an "officer" of a State.

If "Congress did not intend for the FDCPA to regulate the collection of a debt owed to a State," Jones Br. 10-11, it would not have expressed that in-

tention by attaching different significance to the word "officer" in these two neighboring provisions. It would have exempted state-owned debt from the definition of "debt" under § 1692a(5), as it did for commercial debt and tax debt. *Id.*; *see* Pet. Br. 24. Or it would have exempted "any person collecting debt owned by a State" from the definition of "debt collector" under § 1692a(6), as it did, for example, for "any person ... serving ... legal process." § 1692a(6)(D).

There is no indication in the text of the FDCPA that Congress intended to leave consumers at the mercy of abusive outside debt collectors, depending on whether they were late on their tuition to the University of Akron or Oberlin. The debt collectors are the same. JA 231-34. The perverse incentives are the same. The consumers are the same. And the Act decrees that the minimum standards of conduct are the same too. In fact, Congress has reiterated in a separate statute that outside debt collectors who assist in the collection of debts owed to the federal government are subject to the FDCPA's proscriptions against abusive debt collection practices. 31 U.S.C. § 3718(a)(2), (b)(6). There is no reason Congress would have wanted debt collectors to be more abusive when collecting debts for state or local governments than when collecting debts for the federal government. This is especially true given that the same outside debt collector could be collecting a debt owed to a private business one minute and turn to collecting a debt owed to a public enterprise the next.

B. Collections special counsel are not "officers" of the State of Ohio.

Since a central point of the FDCPA is to distinguish a creditor's in-house personnel from outside debt collectors, it makes perfect sense that Congress would exempt "*officers* or employees" of a company and "*officers* or employees" of a "State." Just as it would be silly to exempt the employees of a private clinic, but not its president, when they pursue patient debts, it would make no sense to exempt the Attorney General's employees, but not the Attorney General, himself.

Ignoring all context, Petitioners insist that every collections special counsel is an "officer ... of [the] State ... collect[ing] a[] debt in the performance of his official duties." Pet. Br. 18-38. The word "officer" cannot bear the weight Petitioners thrust on it. This Court's case law and common law would never have defined collections special counsel as officers. § I.B.1. The Dictionary Act embraces the same legal backdrop. § I.B.2. Petitioners' arguments for nevertheless treating collections special counsel as officers are meritless. § I.B.3.

1. Collections special counsel are not officers under this Court's precedents and common law.

Petitioners agree that Congress is presumed to have embraced the historical understanding of "officer" as set out in this Court's precedents and common law. Pet. Br. 22; *see United States v. Wells*, 519 U.S. 482 (1997). That historical definition is the one

this Court pronounced in *Metcalf & Eddy v. Mitchell* and has repeated multiple times in cases revolving around the meaning of "officer" (or "office") in federal statutes: one who occupies "a public station, permanent in character, created by law, whose incidents and duties were prescribed by law." 269 U.S. 514, 520 (1926). Packed into this definition are two basic attributes of an "officer": (a) the office must be "created by law" with "duties ... prescribed by law," not contract; and (b) the office must be "permanent" and continuing. And this Court has also observed that taking an oath of office is relevant. Collections special counsel fail each element.

Position created by law. This Court has explained what it means for an office to be "created by law, whose incidents and duties were prescribed by law." *Metcalf*, 269 U.S. at 520. In *Metcalf*, this Court held that two engineers who advised States on water supply and sewage disposal systems were not officers for purposes of the War Revenue Act of 1917 (holding "officers and employees" of "any state" exempt from federal income taxes). 269 U.S. at 519. The reason was that "[t]heir duties were prescribed by their contracts," and not by law. *Id.* at 520. This Court stressed that the term "office" "embraces the idea of ... duties fixed by law. Where an office is created, the law usually fixes its incidents, including its terms, its duties and its compensation." *Id.* Because there "was no office of sewage or water supply expert or sanitary engineer" with duties prescribed by law, the engineers were not officers. *Id.* By contrast, where Congress established the "duties" of a "special trial judge," it created an office. *Freytag v. Comm'r*, 501 U.S. 868, 881-82 (1991).

Time and again, this Court has found that a person is not an officer on the basis of this element—with a particular focus on whether a legislature or a contract defined the position's duties. *See Burnap v. United States*, 252 U.S. 512, 517 (1920) ("landscape architect" for public grounds not an officer where "no statute ... create[d] an office of landscape architect" or "define[d] the duties of the position."); *Hall v. Wisconsin*, 103 U.S. 5, 7-9 (1880) (where the state legislature appointed a commissioner and directed the governor to make a written contract "stipulating and setting forth the nature and extent of the services to be rendered," the commissioner was not an officer because, among other things, the duties were established by contract, not by law).

This distinction between statutory and contractual duties was a central feature of the common law backdrop against which this Court decided those cases. Take, for example, Mechem, the treatise Petitioners cite more than any other. Their reliance on Mechem is curious, for he emphatically supports our position and rejects Petitioners' Mechem observed that "the fact that the powers in question are created and conferred by law, is an important criterion" in distinguishing between an "office" and other positions. Floyd R. Mechem, *The Law of Public Offices and Officers* § 5, at 5 (1890). Prescribed by law means that "an office finds its source and its limitations in some act of governmental power," and not "contract." Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 223 (1905). "A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects."

United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867).

Collections special counsel do not hold offices established by law. Petitioners concede, as they must, that there is no "office of [the] special counsel" in Ohio. Pet. App. 35a; Pet. Br. 33. Moreover, collections special counsel's duties and powers are not prescribed by law. As the court of appeals observed, the only statute that refers to collections special counsel "primarily governs the conduct of the Attorney General, and not that of special counsel." Pet. App. 31a. It provides that "[t]he attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." Ohio Rev. Code Ann. § 109.08. The statute therefore permits the Attorney General to appoint special counsel to assist with debt collection as needed—just as it authorizes the Attorney General to "appoint such employees as are necessary." *Id.* § 109.05. The statute is similar to the statutes in *Hall* and *Burnap*, which authorized appointments but did not give rise to offices or officers because they prescribed no particular duties.

It is the retention agreement, not the statute, which sets out collections special counsel's duties and powers. For example, "Special Counsel shall conduct any and all legal work assigned by the Attorney General." JA 142. Without a signed "retention agreement" and a specific assignment of a claim from the Attorney General's electronic database,

collections special counsel can perform no duties and exercise no power.

The retention agreements also specifically exempt special counsel from provisions of Ohio law governing officers and employees. The Ohio Code requires the State to indemnify and defend its officers and employees from lawsuits. *See* Ohio Rev. Code Ann. § 9.87 (indemnification); *id.* § 109.361 (representation). But the retention agreements provide that these provisions do not apply to special counsel, *see* JA 144, and they require special counsel to indemnify the State, JA 159.[2]

Permanent and continuing. This Court's cases have also never wavered from the position that an office must have duties that are "permanent in character," *Metcalf*, 269 U.S. at 520, and that "continue, though the person be changed," *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); *see United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *Hartwell*, 73 U.S. at 393; Mechem, *supra*, § 8, at 6-7 Where "duties are not continuing and permanent, [but] occasional and intermittent," there is no office and the subject is not an officer. *Germaine*, 99 U.S. at 512.

Permanent duties are duties that are entrusted to the office, as opposed to duties that a person con-

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[2] That collections special counsel must comply with Ohio public records law, Pet. Br. 37-38, does not make them officers. It shows only that the Attorney General cannot circumvent public records laws by outsourcing consumer debt collection to private debt collectors.

tracts to perform personally, "as needed." This Court's decisions in *Germaine* and *Auffmordt* illustrate. In *Germaine*, the Commissioner of Pensions "appoint[ed]" a physician to determine, as needed, whether persons were eligible for certain public benefits. This Court held that the physician was not an officer because the position was neither permanent nor continuing: "The surgeon [was] only to act when called on by the Commissioner of Pensions .... He may make fifty of these examinations in a year, or none." *Germaine*, 99 U.S. at 512. In *Auffmordt*, this Court applied *Germaine* and held that an expert appraiser engaged to value goods for customs duties was not an officer because he "ha[d] no claim or right to be designated, or to act except as he may be designated." *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

Collections special counsel hold positions that are neither continuing nor permanent. Like the physician in *Germaine* and the appraiser in *Auffmordt*, special counsel are "only to act when called on by the" Attorney General's Office to collect a debt. *Germaine*, 99 U.S. at 512. Even after signing a retention agreement, collections special counsel have "no claim or right to" to any work assignment of any kind, *Auffmordt*, 137 U.S. at 327 The Attorney General may "increase ... the number of Claims assignments made" for collections special counsel who "substantially increase the collection of their assigned Claims," and may decrease the number of assignments for collections special counsel who are not successful. JA 145. "Absent a contract *and* work being specifically assigned thereunder, 'special counsel' is an empty title." Pet. App. 33a.

Collections special counsel also hold no continuing position. Each agreement provides that it "shall terminate on" a specified date, and after the termination date "[n]o services rendered by Special Counsel ... shall be authorized." JA 142. When the contract terminates, the special counsel does not leave a vacant office for another person to fill. Instead, "[b]oth Parties [agree] that the appointment of Special Counsel is personal in nature," JA 171, and the Attorney General retains as many collections special counsel as he believes he will require in any given year. He retained 86 in 2012, and 69 the next year. JA 128.

No oath. A person who "took no oath of office" is probably not an officer. *Metcalf*, 269 U.S. at 519-20. The U.S. Constitution requires that officers take an oath of office. "[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3. So does Ohio law. Ohio Rev. Code Ann. § 3.22. Thus, "to be an officer, the person should have sworn an oath and possess a commission." *DOT v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring). That requirement "may seem mundane on its face" but there "is good reason to think that those who have not sworn an oath cannot exercise significant authority." *Id.* at 1234-35.

Collections special counsel take no oath of office, further confirming that they are not officers.

2. The Dictionary Act does not change the historical meaning.

Petitioners place considerable weight on the Dictionary Act's definition of "officer." Of course, that definition cannot change the meaning where "the context indicates otherwise." 1 U.S.C. § 1. So nothing in that statute can overcome the context discussed above (at 17-18) distinguishing in-house personnel from outside debt collectors. In any event, as Petitioners concede, the Dictionary Act merely codified the "historical[] ... meaning" of the term "officer," Pet. Br. 22, and is thus entirely consistent with this Court's two essential attributes. Indeed, *Metcalf* applied the same familiar attributes to determine officer status to federal statutes enacted *after* Congress passed the Dictionary Act.

The Dictionary Act defines an "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. That is just a pithy way of capturing the two key qualifications of an "officer" prescribed by this Court's precedents and common law. By describing an officer as someone who is "authorized by law to perform the duties of *the* office," the definition captures the basic criterion that the person holds an office that is created by law with duties prescribed by law and not contract. And by referring to "*the* office," the definition embraces the criterion that an officer performs duties that are permanent and continuing and not personal.

Thus, collections special counsel fail the Dictionary Act definition for the same reason that they fail the historical definition. *See* Pet. App. 31a-36a.

3. Petitioners' arguments are meritless.

Petitioners' various arguments for nevertheless treating collections special counsel as officers defy both precedent and the plain meaning of the Dictionary Act.

a. To start, Petitioners announce a rule for qualifying as an "officer" that this Court has never embraced.

Petitioners assert that collections special counsel are officers as long as Ohio law "empower[s] the position, nothing more." Pet. Br. 31. By that logic, every employee in the Attorney General's Office is an "officer," because Ohio law empowers its Attorney General to "appoint" all staff. Ohio Rev. Code Ann. §§ 109.05, 109.08.[3] This argument ignores the settled precept that the duties of the office must be prescribed by law, not by contract. As Chief Justice Marshall explained, an Act "empowering the president, generally, to cause fortifications to be constructed" could not establish an office of "agent of fortifications" that the President could create and fill by appointment. *Maurice*, 26 F. Cas. at 1214. Instead, for the agent to be an officer, a statute or reg-

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[3] It is thus of no moment that the Ohio legislature authorized the Attorney General to "appoint" collections special counsel. Ohio Rev. Code Ann. § 109.08. A bare authority to "appoint" does not create an office or an officer. *See Hall*, 103 U.S. at 9-10. Just because all Ohio employees are "appointed," *see, e.g.*, Ohio Rev. Code Ann. § 124.01(F) (defining "employee" as "any person holding a position subject to appointment"). does not mean that a janitor is a state "officer."

ulation had to provide "for the appointment, and define the duties." *Id.* Only because a regulation subsequently adopted by Congress did just this, did Chief Justice Marshall hold the agent an officer. *Id.* at 1215.

In similar vein, Petitioners argue that a person is an officer as long as he performs a "sovereign function[]." Pet. Br. 28-29. This Court's decisions have never said that. And while some treatises state that performing a sovereign function is a necessary criterion in order to be an officer, none state it is sufficient.

Regardless, collections special counsel do not perform sovereign functions. As Mechem himself explains, "sovereign functions of government" are "either legislative, executive or judicial" and "[u]nless the powers conferred are of this nature, the individual is not a public officer." Mechem, *supra,* § 4, at 5; *see* Pet. App. 35a-36a (quoting Black's Law Dictionary for the proposition that "sovereign power" is "[t]he power to make and enforce laws"). Collections special counsel do not wield any of these sovereign powers. Like any consumer debt collector, they do not make any laws. They also do not execute or interpret any laws. And in sending demand letters and filing complaints for "account stated" to recover debts owed to the University of Akron, they do not enforce any laws of the State of Ohio. *E.g.*, Complaint, *Ohio State Univ. v. Braun,* No. 13-CV-9467 (Ohio Ct. Com. Pl. Aug. 26, 2013) *available at* http://tinyurl.com/zcah6pt.

Petitioners are unclear on what the sovereign power is that collections special counsel supposedly wield. Their cert. petition indicated that consumer "debt collection qualifies as a central sovereign activity," Pet. 17. But for support, they cited only cases noting that state debts were once entitled to priority over regular debts at common law, and were not discharged in bankruptcy. Pet. 17; Pet. Br. 1-3. As the court of appeals aptly observed, "[t]he authority to collect consumer debts is not a sovereign power; instead, it is a right that can be exercised by any creditor." Pet. App. 35a. Now, Petitioners switch gears, arguing that collections special counsel wield two completely new sovereign powers: They "represent the sovereign in court," Pet. Br. 14, and receive public moneys, Pet. Br. 29.

As to the first, this case does not involve representing the sovereign in court. It involves letters to debtors who have not been—and may never be—sued. And even if representing the sovereign in court were a sovereign power, the Ohio legislature has endowed only the Ohio Attorney General, not collections special counsel, with that authority. Ohio Rev. Code Ann. §§ 109.02; 131.02(C). Collections special counsel may neither "initiat[e] litigation on behalf of the State" nor enter into any "final settlements" without "the prior approval of the Attorney General," JA 149; must consult "as soon as possible" with the Attorney General's office regarding any "controversial, high profile, or otherwise noteworthy" matter, including all appeals, JA 146; and "shall consult with and obtain the approval of the [Attorney General's office] before responding to any public records request," JA 147 Given these

constraints, special counsel do not exercise sovereign power just because the Attorney General authorizes them to file a suit for account stated—any more than a contractor exercises sovereign power when the Transportation Department authorizes him to build a federal highway.

On this very basis, courts long ago established that even attorneys who assist States in the collection of tax debts are not officers because they do not *themselves* exercise any sovereign authority.[4] And numerous courts likewise have held that non-attorneys who assist in the collection of public debts are not officers because they exercise no sovereign authority.[5]

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[4] *See State Tax Comm'n v. Harrington*, 94 A. 537, 539 (Md. 1915) (general counsel to the tax commission not an officer because, among other reasons, "the incumbent exercises no sovereign power, but only such power as is derived from and through the State Tax Commission"); *State ex rel. Gibson v. Fernandez*, 58 P.2d 1197, 1200 (N.M. 1936) (special tax attorney not an officer because "all sovereign power affecting the collection of delinquent taxes is conferred on the commission," not the collector).

[5] *See Cochran v. Comm'r*, 135 F.2d 45, 47 (5th Cir. 1943) (land agent appointed by governor to sell real estate for taxes who took an oath of office is not an officer or employee because he "was serving under a contract"); *Jefferson County v. Case*, 12 So. 2d 343, 345-46 (Ala. 1943) (deputy tax collector who "dispersed money received and collected" not an officer where "duties are undefined by the statutes"); *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974) (deputy tax collector not officer because deputies "act[ed] in the right of the tax assessor-collector rather than in their own right").

Petitioners do not advance their argument by noting that the U.S. Attorney General is an officer who exercises sovereign power. Pet. Br. 25. That is because he is the sovereign's *chief law enforcement official* who is statutorily assigned responsibility for "the direction of" nearly all "litigation in which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 516. That does not mean that every lawyer who represents a public entity—in-house or outside—is exercising sovereign power, and it certainly does not mean that a lawyer representing the State in a claim for "account stated" is an officer.[6]

As for receiving public moneys, Petitioners are wrong in asserting that all "persons ... through whose hands money due to the public ... passes on [the] way to the public treasury" are officers of the State. Pet. Br. 29 (citation and quotation marks omitted). Money due to the public passes through the hands of every IRS mailroom clerk, post office teller, and FedEx driver. That does not make them all officers performing sovereign functions.

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[6] *See Norcross v. Helvering*, 75 F.2d 679, 680 (D.C. Cir. 1935) (attorney litigating state claims against federal government not an officer because attorney's duties were established only by contract); *Buckner v. Comm'r*, 77 F.2d 297, 299 (2d Cir. 1935) (special assistant attorney general not an officer because "he was a 'private citizen' engaged in the general practice of his profession in the course of which he entered into a contract with the state"); *Comm'r v. Emerson*, 98 F.2d 650, 651 (3d Cir. 1938) (township attorney not officer because he was an independent contractor); *Haight v. Comm'r*, 52 F.2d 779, 781 (7th Cir. 1931) (same); *Childers v. Comm'r*, 80 F.2d 27, 31 (9th Cir. 1935) (same).

b. Petitioners offer several illustrations to support their proposed line, but they all confirm that this Court's two essential criteria govern.

On one side of the ledger are the personnel Petitioners correctly maintain *are* officers. For example, no doubt, the United States Attorney General is, and has always been, an officer of the United States. That is true even though he "maintain[ed] an active private law practice until 1853." Pet. Br. 25 (quotation marks and citation omitted). Same for Commissioners of the Federal Election Commission. Pet. Br. 29. And same for United States "[d]istrict attorneys (now U.S. Attorneys)." They were officers even though they were long-ago employed "on a fee-for-services basis" when enforcing the revenue laws. Pet. Br. 29.

Why? Because they all satisfied the two criteria: (1) Congress defined their positions and prescribed their duties; and (2) they held offices with ongoing duties to enforce and interpret the laws of the United States that continued beyond the tenure of any one individual. For example, Congress provided that a district attorney "shall be appointed in each district ... to act as attorney for the United States in such district." *Revised Statutes of the United States Passed at the First Session of the Forty-Third Congress*, 1873-74, § 767 (2d ed. 1878). Congress entrusted the district attorney with the duty "to prosecute ... all delinquents for crimes and offenses ... and all civil actions in which the United States are concerned." *Id.* § 771. And the district attorneys held their posts for a term of four years, *id.* at § 766, during which time they were the ones primarily re-

sponsible for representing the United States in their districts.[7]

On the other side of the ledger are personnel who are not officers. Petitioners cite Mechem for the proposition that at common law a deputy sheriff was an officer, even though the statute did not define certain attributes of the office. Pet. Br. 20-21 (citing Mechem, § 379, at 250). But Mechem explained that a deputy sheriff was *not* an officer *unless* "such appointment is provided for by law ... which fixes the powers and duties of such deputies." Mechem § 38, at 16. "[W]here the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent." *Id.*

c. Petitioners ignore the cases that are most on point—cases like *Metcalf* and *Germaine*, in which this Court has construed the term "officer" in federal statutes. Instead, they pull stray quotes mainly from state court cases. But those cases only confirm the centrality of the two key criteria that this Court has invoked.

In the one Supreme Court case, this Court specifically acknowledged that "[a] government office is different from a government contract." *Hartwell*, 73 U.S. at 393 (cited at Pet. Br. 27, 31). And it held

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[7] *Accord Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (recognizing FEC Commissioners were empowered to issue binding interpretations of federal election laws and "institute" litigation to enforce the statute without the "concurrence of or participation by the Attorney General").

the clerk an officer in part because his "duties were continuing and permanent, not occasional or temporary." *Id.*

Petitioners' state court cases are similar. *Commonwealth v. Evans* held that an attorney collecting claims for the State was an officer, but only where he "had official duties under [a] joint resolution, as his bond acknowledged," and he was not performing a "service rendered to the Commonwealth under a contract." 74 Pa. 124, 140 (1874). *Patton v. Board of Health* held that health commissioners were officers because "the legislature ... created the office and has fixed the salary attaching to it," and the "duties [were] not prescribed by contract, but [were] defined by the government through the board of health." 59 P 702, 706 (Cal. 1899) (cited at Pet. Br. 31); *accord State ex rel Clyatt v. Hocker*, 22 So. 721, 723 (Fla. 1897) (cited at Pet. Br. 21). In *Solowitch v. Bennett*, the "duties of the deputy registrar [were] also prescribed by statute." 456 N.E.2d 562, 565-66 (Ohio Ct. App. 1982) (cited at Jones Br. 15). And *Territory v. Wills* invoked Chief Justice Marshall's admonition that an office "is defined by rules prescribed by the government, and not by contract." 25 Haw. 747, 751-52 (1921) (quoting *Maurice*, 26 F. Cas. at 1214) (cited at Pet. Br. 31).

The only other precedent from this Court on which Petitioners meaningfully rely is *Filarksy*. But *Filarsky* was not about the meaning of the word "officer" in any statute, which is problematic because (as Petitioners emphasize) "this case involves the meaning of 'officer' in a federal statute." Pet. Br. 36.

Filarsky was about the scope of the judge-made doctrines of absolute and qualified immunity. While this Court observed that "the common law did not draw a distinction between public servants and private individuals engaged in public service in according [immunity] protection to those carrying out government responsibilities," *Filarsky v. Delia*, 132 S. Ct. 1657, 1663 (2012), it did not hold that all those granted immunity at common law were also "officers." To the contrary, the prevailing law held that, while members of the "posse comitatus" "had the same authority as the sheriff, and w[ere] protected to the same extent" when executing a warrant in terms of immunity from suit, *id.* at 1664 (citation omitted), they were "not themselves officers" of the State, *Robinson v. State*, 18 S.E. 1018, 1019 (Ga. 1893). Granting a non-officer immunity does not turn him into an officer—and this Court never said it does.

C. The clear-statement rule does not apply and would be satisfied anyway.

Petitioners and Jones maintain that any ambiguity must be resolved in their favor because the FDCPA "touches a sensitive area ... that raises sovereignty concerns." Pet. Br. 25; *see* Jones Br. 23-24. Even if they were right, it would not matter because Congress spoke clearly. The Act's language, structure, and purpose all point inexorably to the conclusion that Congress wanted to distinguish between in-house debt collectors and outside debt collectors—not to license outside debt collectors to lie, abuse, and threaten consumers whenever their client is a public entity.

In any event, Petitioners are wrong; the clear-statement rule does not apply here. The clear-statement rule is as follows: "[I]t is incumbent upon the federal courts to be certain of Congress's intent before finding that *federal law overrides the usual constitutional balance of federal and state powers.*" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added)). This Court has applied this principle only where federal legislation threatens a "radical[] readjust[ment]," "significant change," or "dramatic[] intru[sion]" with respect to the federal-state balance. *Bond*, 134 S. Ct. at 2088-89 (citations omitted).

The FDCPA does not "override" any constitutional balance—much less "radically" or "dramatically" so. The FDCPA does not prevent States from collecting debts. It does not constrain state-employed debt collectors in any way—even from using misleading or abusive tactics. It does not prevent States from hiring outside debt collectors to help it collect debts. It merely prohibits outside debt collectors from using unscrupulous and thuggish methods when collecting one category of debts—debts consumers incur when they buy goods and services. Petitioners' complaint is that the court of appeals did not carve out an exception for when an outside debt collector's client is a public entity. Petitioners do not point to any tradition of States using unscrupulous and thuggish methods when collecting debts from consumers—much less hiring outside debt collectors to do so. If the Act's restrictions were such a significant intrusion on state sovereignty, the Attorney General would not draft retention agreements with

debt collectors insisting that they comply with the FDCPA. JA 162-63.

Notably, Petitioners do not argue that the FDCPA represents a "radical" change or even a significant incursion on state sovereignty. They argue only that the Act "touches a sensitive area." Pet. Br. 25. That is not the test. This Court has applied the clear-statement rule only in situations representing serious intrusions upon state sovereignty. *Gregory*, for example, concerned whether Congress intended a federal law to invalidate "a state constitutional provision through which the people of Missouri establish[ed] a qualification for those who sit as their judges"—"a decision of the most fundamental sort for a sovereign entity." 501 U.S. at 460. In *Bond*, the question was whether Congress intended a law implementing an international chemical weapons treaty to federalize a wide swath of local criminal activity that had previously been punishable only by the State. 134 S. Ct. at 2087-88. At issue in *BFP v. Resolution Trust Corp.* was whether "[t]he title of every piece of realty purchased at foreclosure would be under a federally created cloud." 511 U.S. 531, 544 (1994). Likewise, in *Nixon*, the State would have lost its traditional right to limit its political subdivisions from entering into contracts, *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004), and in *Ours Garage*, Ohio would have lost its traditional right to delegate to its subdivisions at all, *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437-40 (2002).

Petitioners' test would itself be a radical shift in this Court's jurisprudence. This Court has encoun-

tered many federal laws that "touch" upon matters of state sovereignty. And it routinely interprets those laws without applying any clear-statement rule. Take, for example, laws that subjected an independent contractor to federal taxation while exempting an "officer or employee of a state." *See Metcalf*, 269 U.S. at 526. Such a law obviously "touches" upon "the structure of government" because it makes employees cheaper hires than contractors. But in that context, this Court simply interpreted the text that Congress enacted. Indeed, it held (without applying any clear-statement precept) that a special counsel hired to collect state taxes did not qualify for the exemption from federal income taxes as an "officer or employee" of a State. *Lucas v. Reed*, 281 U.S. 699 (1930) (per curiam). This Court also applied no clear-statement rule when it held that the antitrust laws applied to market participants to whom a State had delegated regulatory control over a market. *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111-14 (2015).

If "touch[ing]" on matters of state sovereignty were enough to trigger the clear-statement rule, then the doctrine would automatically carve States and state contractors out of just about any generally applicable federal law unless the law explicitly provided otherwise. States would be exempt from laws that impose emissions controls on cars (including police cars) and restrict the services of banks (including banks that hold state funds), and state contractors would be immune from laws that impose safety standards on the worksites they run (including public works projects).

As these examples (and so many more) illustrate, there is no principled way to figure out when federal legislation touches on "a sensitive area" or a "sovereign function." Petitioners' approach would require this Court to conduct the very case-by-case "judicial appraisal of whether a particular governmental function is 'integral'" that this Court abandoned as "unworkable" in *Garcia v. San Antonio Transit. Auth.*, 469 U.S. 528, 546-47 (1985).

Petitioners' invitation to depart from existing principles is especially inapt where, as here, they extol the FDCPA for "show[ing] a healthy respect for federalism." Pet. Br. 14. The FDCPA excludes state employees from its definition of "debt collector", expressly cabins the scope of any displacement of state law; and allows States to seek to exempt categories of debt collection practices from the FDCPA entirely. §§ 1692a(6), 1692n, 1692o. This is not a statute that rides roughshod over state sovereignty.

II. The Collections Special Counsel's Letters Violate The FDCPA.

On the legality of the dunning letters at issue here, Petitioners ask the wrong question—and then answer it incorrectly. The question is not whether this Court believes the dunning letters are misleading. The question is not whether a consumer (average, unsophisticated, or least sophisticated) would find them materially misleading. The question is simply whether the dunning letters fit within either of two enumerated violations that *Congress* defined as per se "violation[s] of this section": Do the letters falsely convey the "impression" that they

were "issued by" the Attorney General, § 1692e(9), or do the senders "use ... any ... organization name other than the true name of the debt collector's business," § 1692e(14)?

The dunning letters violate the Act in both respects for the simple reason that Sarah Sheriff and Eric Jones are not the "Ohio Attorney General" and do not work at the "Office of the Ohio Attorney General." § II.A. Petitioners are wrong in insisting that this Court is entitled to second-guess Congress's definition of a violation by grafting onto the statute a materiality requirement that Congress did not prescribe. § II.B. But the letters are materially misleading, in any event, under any standard: A consumer reacts differently to a letter she receives from the chief law enforcement officer of the State than she reacts to a letter from a professional debt collector—or at least a jury could so find. § II.C. While this Court need not reach the question, the court of appeals correctly viewed the letters from the perspective of the least sophisticated consumer. § II.D.

A. Collections special counsel's use of Attorney General letterhead violates two enumerated provisions of § 1692e.

1. The letters violate § 1692e(9) by leaving the false "impression" that they were "issued by" the Attorney General.

Section 1692e(9) provides that "the following *is a violation*" of the Act:

> The use or distribution of any written communication which *simulates* or is falsely represented to be *a document* authorized, *issued*, or approved by any court, official, or agency of the United States or *any State*, or which creates a *false impression* as to its *source*, authorization, or approval.

§ 1692e(9) (emphasis added). The dunning letters that Sheriff and Jones sent to their targets violate the plain terms of this provision for two distinct reasons: (1) each "simulates ... a document ... *issued* ... *by*" the Attorney General; and (2) each "creates a false impression as to its *source*." The asserted violation revolves around those two words—"issued" and "source."

When you put a letter on letterhead that blares, "Office of the Ohio Attorney General" in large type, you communicate that the letter was "issued by" that office—that the "source" is someone in that office. After all, letterhead is typically understood to "indicat[e] the source of origin of the document." *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009).

That is a "false impression." These letters were not "issued by" the Attorney General or his office; they were "issued by" collections special counsel. As Petitioners concede, collections special counsel are independent contractors and not employees of the Attorney General. Pet. Br. i, 7 Collections special counsel work out of their own offices, using their own staff and equipment, at their own expense. JA 163-64. They are not even allowed to put the Attorney

General's logo on their business cards. JA 173. In short, collections special counsel are not the Attorney General, nor are they part of his office. That is why courts have consistently found violations where debt collectors have done what Jones and Sheriff did here, because a private person's use of government letterhead is inherently misleading.[8]

Petitioners do not deny that each letter "simulates ... a document ... *issued* ... by" the Attorney General or that each "creates a false impression as to its *source*." Instead of focusing on the plain language that makes out the violation—the two words "issued" and "source"—Petitioners offer two arguments in mitigation, arguing essentially that one can imagine more serious cases of simulation or source confusion.

Petitioners' main theme is that the letterhead "accurately conveys" that collections special counsel act "for" or "on behalf of" the Attorney General when they send their dunning letters. *E.g.*, Pet. Br. i, 13, 17, 46, 47; *see* Jones Br. 37-38. That would be a fine defense if the statute forbade nothing but written

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[8] *See, e.g., Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F. Supp. 2d 1116, 1134 (N.D. Cal. 2010) (letters on district attorney letterhead violated § 1692e(9) because they did not "disclose the identity of the actual sender," an outside debt collection agency); *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1076 (E.D. Cal. 2008) (inclusion of district attorney's name and title in debt collection company's letterhead falsely represented letters were from a district attorney's office); *Gradisher v. Check Enf't Unit, Inc.*, 210 F. Supp. 2d 907, 914 (W.D. Mich. 2002) (use of Sheriff Department letterhead falsely suggested that collection letters came from there, rather than an independent contractor).

communications that "falsely convey on whose behalf" they were written. But it is no defense to violating a statute that prohibits also false impressions as to who "issued" or was the "source of" the letter. The problem with the Attorney General's letterhead is that it falsely conveys the impression that his office "issued" the letter, not just that someone else wrote it "on his behalf."

There is a difference. If a law firm intends to send a letter for or on behalf of a client, it uses its own letterhead and indicates in the body of the letter on whose behalf it is writing. If instead a law firm sends a letter on its client's letterhead, it indicates that the letter was issued by the client, not simply for the client or on the client's behalf.

That is why Petitioners miss the mark in noting how important it is for special collections counsel "in all ... correspondence" to "indicate that such document is prepared by the Special Counsel in its position as Special Counsel for the Attorney General." Pet. Br. 47. They do not need to use Attorney General letterhead to convey that. All they need to do is what any lawyer does in any letter he writes on behalf of a client: Open with, "We write as Special Counsel for the Attorney General."

Petitioners' other argument is that the letters do not "falsely represent[] that special counsel's letters are *authorized* by the office." Pet. Br. 46 (emphasis added). That defense would be relevant (though ul-

timately wrong[9]) if we were asserting a different violation—that the letters are "falsely represented to be a document *authorized* ... by" the Attorney General. But Congress rendered the violations in § 1692e(9) in the disjunctive ("authorized, *issued*, *or* approved by" the Attorney General/"false impression as to its *source*, authorization *or* approval"). Petitioners cannot excuse the violation they did commit by pointing to violations they did not commit.

The Attorney General conceded the point at oral argument below. He acknowledged that an outside debt collector violates the Act if she uses IBM's letterhead to collect a debt owed to IBM, even though she is acting on IBM's behalf and with IBM's full authorization. JA 413-14, 419-20.[10] Nothing in the statute distinguishes IBM from the University of Akron.[11]

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[9] The reason the defense would fail is that a debt collector violates § 1692e(9) unless the specific "written communication ... is ... a document authorized ... or approved by" the Attorney General. Here, collections special counsel independently "draft, print, compile, and distribute each collection letter they use." JA 122. The Office of the Attorney General does not review, "authorize[]" or "approve[]" individual letters. *See id.*; *Avila v. Rubin*, 84 F.3d 222, 228 (7th Cir. 1996) (use of attorney letterhead violated § 1692e(9) because he was "not personally or directly involved in deciding when or to whom a dunning letter should be sent"); *Clomon v. Jackson*, 988 F.2d 1314, 1317, 1321 (2d Cir. 1993) (same).

[10] The conversation there happened to be about § 1692e(14), but the point is the same for both.

[11] In what may be a third variation on the same theme, Petitioners contend that the letters are effectively "issued by" the Attorney General because collections special counsel act as

2. The letters violate § 1692e(14) by using a name other than collections special counsel's "true name."

The violation of § 1692e(14) is even simpler. That paragraph provides that "the following conduct *is a violation*" of the Act:

> The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

§ 1692e(14) (emphasis added). The dunning letters here match the plain terms of this prohibition because "Office of the Ohio Attorney General" is not the "true name of the debt collector's business."

The Attorney General has conceded the violation by stipulating that "[e]ach Special Counsel has a true business name, company name or organization name *which is different than* the Attorney General's Office." JA 122 (emphasis added); *see* JA 131 ("Special Counsel use both the official letterhead stationery of the Attorney General's Office *as well as their*

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the Attorney General's "agents" when they send the letters out. Pet. Br. 50. But the retention agreements declare that collections special counsel are not the Attorney General's agents. JA 163. Even if they were, that would not mean that letters they send on behalf of the Attorney General are "issued by" him or his office under § 1692e(9); it simply means they are issued on his behalf. Same with any letter sent by a lawyer on behalf of a client. Acting on a client's behalf does not turn the lawyer into the client himself.

own names and their own law office names in their letters to debtors.").

Petitioners make essentially the same arguments against this straightforward conclusion as they make against ¶ 9—and they are wrong for essentially the same reasons. They assert that "Special counsel *do* act for the Attorney General's Office and so the office's name is not a pseudonym." Pet. Br. 48; *see* Jones Br. 32. But the fact that collections special counsel collect debts under contract with the Attorney General does not entitle them to represent that they *are* the Attorney General or part of his office. Congress enacted this provision because it wanted to prohibit exactly this sort of blurring: outside debt collectors who operate a "business the principal purpose of which is the collection of any debt[]" trying to pass themselves off as the actual creditor to whom the debt is owed. § 1692a(6).

Here, again, the Attorney General's IBM concession discussed above (at 44) settles the matter. But here it is even starker, because any other conclusion would gut the provision wholesale. Violations of § 1692e(14) "typically involve a debt collector ... purporting to be the creditor when it is not." *Mahan v. Retrieval-Masters Credit Bureau, Inc.*, 777 F. Supp. 2d 1293, 1300 (S.D. Ala. 2011); *see Peter v. GC Servs. L.P.*, 310 F.3d 344 (5th Cir. 2002) (private debt collector hired by the U.S. Department of Education could not lawfully identify the Department as the return addressee on the collection letter envelope); *Carrizosa v. Stassinos*, No. C-05-02280 RMW, 2010 WL 4393900, at *2 (N.D. Cal. Oct. 29, 2010) (granting summary judgment

against debt collector for violating § 1692e(14) by sending letters in the creditor's name rather than its own name); *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1046 (W.D. Wis. 2002) (same).

Petitioners and Jones worry that faithful application of ¶ 14 would "require[] them to hide" "special counsel's connection to the office." Pet. Br. 53; *see* Jones Br. 36. That is absurd. Section 1692e(14) prohibits a debt collector from using another organization's name as its own. It does not prohibit a debt collector from *referring to* its client or accurately describing its relationship to the client. The FDCPA expressly contemplates that the "initial communication with a consumer in connection with the collection of any debt" may contain "the name of the creditor to whom the debt is owed." § 1692g(a)(2). Thus, as earlier noted (at 43), collections special counsel are free to disclose the relationship in the text of the dunning letter.

B. Petitioners cannot change the result by inserting a materiality element.

Petitioners and Jones maintain that it does not matter whether the letters violate the plain terms of ¶¶ 9 and 14 because any violation that has been proven is not materially misleading. Pet. Br. 43-44; *see* Jones Br. 37 This argument fails for two reasons. First, Congress did not prescribe any such requirement for the enumerated violations listed in § 1692e(1)-(16), including the two at issue here. Second, as we demonstrate in the next section, any such element is satisfied regardless. § II.C.

The statutory text is the starting place for "discern[ing] whether [a statute] require[s] a showing of materiality." *Neder v. United States*, 527 U.S. 1, 20 (1999). The FDCPA enumerates 30 specific prohibitions distributed among three categories. Each category begins with a catch-all prohibition, followed by a series of enumerated violations.

The provision at hand begins:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

§ 1692e. The section then lists 16 acts, each of which "*is* a violation" of the Act. Similarly, the immediately preceding section begins:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

§ 1692d. The section then lists six items, each of which "*is* a violation" of the Act, such as the "publication of a list of consumers who allegedly refuse to pay debts." § 1692d(3); *see also* § 1692f (same structure—a catch-all prohibiting "unfair or

unconscionable" means to collect a debt, followed by eight enumerated "violation[s]").

When Congress repeatedly says "the following conduct *is a violation* of this section," it means that a debt collector who engages in that conduct is violating the statute. It does not mean that the violation requires proof of some additional, unrecited element. Thus, when a plaintiff proves that a debt collector published a list of purported deadbeats in the local paper, he has proven a violation of § 1692d(3). The debt collector cannot defend by arguing, "There is nothing abusive about publishing such a list," or "this particular list was not abusive, because these deadbeats deserved it." Congress made the judgment, and a court has no latitude to second-guess it.

So, too, for § 1692e. Once we demonstrate that the dunning letters match one or more of the prohibitions enumerated in that section, the debt collectors cannot defend by arguing, "There is nothing misleading about this particular act of misrepresenting the source of the letter or using a name other than the true name of our business." And they certainly cannot defend by saying, "This letter may have been misleading, but the violation should be excused because the misimpression should not affect the recipient's behavior." Congress made the judgment, and this Court has no latitude to second-guess it. Congress wanted to stop certain debt collection practices cold, not foster courtroom debate over whether those practices might be tolerable under some circumstances. *See Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992) (to remedy a "widespread problem," Congress "crafted a broad statute").

Ignoring the clear language establishing per se violations, Petitioners insist that this Court should borrow a materiality element underlying traditional definitions of terms like "misleading" and "deceptive" and engraft it onto the FDCPA. Pet. Br. 39, 43-44. But the sentence introducing the enumerated violations does not use those terms. *See* 15 U.S.C. § 1692e ("[T]he following conduct is a violation of this section ...."). Only the previous sentence does—the catch-all. Petitioners would have no argument if Congress had not included the catch-all or if it had put it at the end (e.g., "Any other practice that misleads ..."). And they do not explain how the catch-all provision up front could possibly limit the categorical provisions that follow. If, as Congress declared, the categorical provisions do not "limit[] the general application of the foregoing," then the "general" pronouncement certainly should not limit the categorical prohibitions.

In any event, even as to the catch-all provision, Congress plainly was not following the common law in designing the statutory scheme. At common law, a tort plaintiff would have to establish reliance, injury, and usually intent or even willfulness to recover for a false misrepresentation. *See* Restatement (Second) of Torts § 537 (1977) ("The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if ... he relies on the misrepresentation in acting or refraining from action ...."); Black's Law Dictionary 724 (4th ed. 1968) (defining "false representation" as "[a] representation which is untrue, *willfully* made to deceive another *to his injury*" (emphasis added)). But Congress eliminated all those elements from the FDCPA, *see, e.g.*,

§ 1692k(a) (declaring that "any debt collector who fails to comply with any provision of this [subchapter] with respect to any person is liable" and imposing $1000 in statutory damages irrespective of any harm suffered), in favor of a strict liability standard, *see Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009). Thus, "the FDCPA permits and encourages parties who have suffered no loss to bring civil actions for statutory violations." *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 96 (2d Cir. 2008). There is no reason to believe that Congress tacitly imported common law materiality into a statute that eliminated just about every other common law element.

C. The letters are materially misleading.

Even if courts are free to second-guess Congress's judgment—and subject each enumerated violation to a separate materiality test—the dunning letters are materially misleading. Or at least a reasonable jury could so find. On this last point, Petitioners seem to forget that the court of appeals did not decide the materiality question as a matter of law; it held only that a reasonable juror could find the letters materially misleading. Since that is the procedural posture (and Petitioners did not seek cert. on whether that was appropriate), Petitioners cannot prevail on this issue unless they prove that no reasonable juror could find the letters materially misleading.[12] By their own definition, that would re-

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[12] Though the Court of Appeals stated that this is a question of fact to be decided by the jury, Pet. App. 50a-51a, we agree with the majority of circuits that whether particular

quire them to prove that no reasonable juror could find that the challenged practice is "capable of leading consumers astray in their action or conduct." Pet. Br. 43 (alterations and quotation marks omitted).

Far from proving this, Petitioners have conceded the point away. Why do they want collections special counsel to use Attorney General letterhead? They say it creates a "sense of urgency," JA 415-16, "to get the debtor to prefer the debt with the state over and above his other debts." JA 416-17; *see* JA 334. In other words, the Attorney General's name at the top communicates a message—and stirs an "action or conduct"—in a way that a letter on special counsel stationery does not.

Petitioners have not volunteered what exactly it is about Attorney General letterhead that motivates in this way. Any number of possibilities come to mind when one views this letter from the perspective of an everyday consumer—your barber, grocery store clerk, or mechanic. For starters, there could be a fear of criminal prosecution. If there is one thing an ordinary consumer knows about the Attorney General, it is that he is the chief law enforcement officer for the State, responsible for enforcing the State's criminal laws. *See* Prosecution, Ohio Attorney General, http://tinyurl.com/z6rljus (last visited Feb. 18, 2016). The Ohio Attorney General actively publicizes his role in criminal law enforcement. *See* News Releases,

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conduct violates the FDCPA is a question of law. *See Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000). Because no party has asked this Court to address that question, it need not do so.

Media, Ohio Attorney General, http://tinyurl.com/hyuopso (last visited Feb. 18, 2016). What the typical consumer (or even a sopnisticated one) almost certainly will *not* know is that the Attorney General is also in the collections business. *See* Pet. App. 49a. Accordingly, when the Attorney General sends a letter referencing an outstanding debt, a consumer could easily worry that failure to promptly pay will result in criminal penalties or other severe consequences. Both Respondents in this case attested that the letters they received from collections special counsel triggered precisely such concerns. JA 137, 139.

Other consumers might be incentivized to pay debts they would otherwise contest because they believe that the Attorney General has reviewed the files and verified that the debt is due and owing. At least so far as appears from the record, that is false—no one in the Attorney General's Office substantively examines the validity and amount of a debt before the electronic database forwards it to collections special counsel. *See* JA 123-26; *Avila*, 84 F.3d at 229 (a letter from an attorney "implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action").

Still other consumers might simply trust the Attorney General and his staff more than a private debt collector who takes a third of the debt as commission, and therefore defer to the letterhead more than they ought to.

Regardless of the mental mechanism, the impression that Petitioners admit to intentionally fostering—that a state debt should be "prefer[ed]" over "other debts," JA 416-17—is false, or at least not uniformly true. There is ordinarily no greater urgency to pay a state debt than any other debt—and there may be all sorts of reasons not to. The state-run clinic cannot evict you or repossess your car. The University of Akron cannot cancel your health insurance or kick your kid out of daycare. The letterhead, therefore, certainly can "lead[] consumers astray in their action or conduct." Pet. Br. 43 (alteration and quotation marks omitted).

The only rationale Petitioners offer to justify the misimpression is that the Attorney General has "special authority" regarding debt collection that outside collectors do not. Pet. Br. at 53-54. But all they point to is the fact that a State can take the debt out of lottery winnings or state tax refunds. Needless to say, few consumers (and even fewer debtors) are lottery winners. And many debtors do not expect tax refunds—especially not imminently. Similarly, the fact that the statute of limitations may not run against the State, Pet. Br. 53, is irrelevant, at best—and it might actually be a reason to prioritize the debts of other creditors, who are under greater pressure to sue soon.

This is enough to satisfy any materiality requirement—and certainly enough to go to a jury. One of Congress's core concerns in passing the FDCPA was to protect consumers against misleading impressions about the legal status of a debt or the consequences of failure promptly to pay. *See*

§ 1692e(2)(A), (4), (5). "Section 1692e was enacted against a backdrop of cases in which courts held that communications designed to create a false sense of urgency were deceptive." *Peter*, 310 F.3d at 352.

Petitioners suggest that the letterhead is not materially misleading because the signature lines report that the signatories are "Outside Counsel" or "Special Counsel for the Attorney General." Pet. Br. 47. While the term "Outside" may mean something to a lawyer, it is foreign to the average consumer. And even the most sophisticated consumer is unlikely to know what "Special Counsel" is. Certainly, a reasonable juror could conclude that the signature line does not overcome the message blaring on the top.

In any event, Petitioners' own proposed standard makes these sorts of disputes—about what consumers perceive—largely irrelevant. The most we need to establish is that the communication "*could* affect a debtor's decisionmaking." Pet. Br. 43 (emphasis added); *see id.* at 44 (a materiality requirement prevents liability for a "technical falsehood"); *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 234 (4th Cir. 2015) ("To violate the statute, a representation ... could objectively affect [a] consumer's decisionmaking." (citation omitted)). This requirement accords with the materiality threshold this Court has recognized in analogous contexts, asking only whether the practice has "a natural tendency to influence, or be capable of influencing," the decision in question. *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (alterations and citation omitted).

Finally, Petitioners prove nothing by observing that insurance agents routinely "use Nationwide's letterhead when selling Nationwide insurance." Pet. Br. 50-51. There is no law against that practice, presumably because (misleading or not) Congress did not think it could lead consumers to act against their own interests when buying insurance. But the FDCPA categorically prohibits analogous conduct in debt collection, because Congress believed that debt collectors *do* mislead consumers into taking action they might not otherwise take when collectors use a principal's letterhead—which, again, is exactly why Petitioners have adopted the practice. Certainly a reasonable juror could so find. Pet. App. 54a.

D. The court of appeals correctly adopted the "least sophisticated consumer" standard.

Petitioners' cert. petition posited two alternative perspectives from which to view deceptive conduct: the "unsophisticated consumer" versus the "least sophisticated consumer." Pet. 24-28. They did the same before the court of appeals. Dkt. 59 (en banc petition). Now, for the first time, Petitioners propose a standard that no circuit has ever applied under the FDCPA, insisting that the proper perspective is that of the "average consumer." Pet. Br. 40-43.

This Court need not address this argument, for several reasons. First, it is waived. S. Ct. R. 24.1(a); *Austin v. United States*, 509 U.S. 602, 622-23 (1993) ("Prudence dictates that [this Court] allow the lower courts to consider [a new] question in the first instance."). Second, as indicated above (§ II.B.), Con-

gress has already made the determination that conduct described in the enumerated paragraphs is materially misleading. Third, especially in light of the Attorney General's concession as to his objective, these letters are materially misleading from any perspective. *Supra* § II.C. But should this Court wish to resolve the issue, it should embrace the standard the court of appeals applied.

Initially, it bears noting that there is little daylight among the various standards on the table. The circuits have observed that there is no "practical difference in application" between the two standards they apply—the unsophisticated and least sophisticated consumer. *Avila*, 84 F.3d at 227; *accord Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014). Regardless of how it is phrased, all courts agree that "the standard is low, close to the bottom of the sophistication meter." *Avila*, 84 F.3d at 226. Petitioners' "average consumer" standard sounds higher at first blush. But Petitioners immediately qualify it by conceding that "[t]he standpoint is ... that of the average consumer in the lowest quartile (or some other substantial bottom fraction) of consumer competence." Pet. Br. 41-42 (quoting *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007)).

Regardless, this Court should follow the "overwhelming majority" of circuits and apply the least sophisticated consumer standard. *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 n.3 (3d Cir. 2015). Because consumers of "below-average sophistication" are "especially vulnerable to fraudulent [debt collection] schemes," *Clomon v. Jackson*, 988 F.2d at

1314, 1319 (2d Cir. 1993), they are "the particular objects of the statute's solicitude," *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997). Only this standard achieves Congress's goal of shielding "the gullible as well as the shrewd" from deceptive debt collection practices. *Clomon*, 988 F.2d at 1318.

Petitioners object that "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative ... class of persons to whom the representation is addressed." Pet. Br. 43 (citation omitted). But the least sophisticated consumer test does not ask what the single "least intelligent consumer in this nation of 300 million people" would believe. *Evory*, 505 F.3d at 774. It does not indulge "bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1319-20. It asks merely what consumers of "below-average sophistication" would believe, *id.* at 1319, which appears to be what Petitioners advocate.

Contrary to Petitioners' assertions, Pet. Br. 42, the least sophisticated consumer standard also has an impressive historical pedigree. The first circuits to adopt the standard drew on decades of jurisprudence under the Federal Trade Commission Act. *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-75 (11th Cir. 1985); *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982). As this Court explained almost 80 years ago, that statute's prohibition against deceptive business practices was intended "to protect the trusting as well as the suspicious." *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937). The fact that a false statement "may be

obviously false to those who are trained and experienced does not ... take away its power to deceive others less experienced." *Id.*; *see Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910) (law governing trademarks was made for the protection of "the public—that vast multitude which includes the ignorant, the unthinking and the credulous").

Accordingly, to assess the "tendency of language to deceive," courts and the FTC have historically looked "not to the most sophisticated readers but rather to the least." *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961). This approach accords with this Court's statements regarding deceptive business practices in general: When "the public lacks sophistication" in a particular area, misstatements that might otherwise be acceptable "may be found quite inappropriate." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

Against this backdrop, it would be "anomalous" to infer that Congress intended to apply a more restrictive standard to FDCPA violations. *Jeter*, 760 F.2d at 1173-74. Congress enacted the FDCPA precisely because existing consumer protection legislation was inadequate to combat deceptive debt collection practices. *Id.*; *see* 1977 U.S.C.C.A.N. at 1696-97 (finding that existing state and federal laws were inadequate to protect consumers); H.R. Rep. No. 95-131 at 3-4 (same). Thus, Congress inserted several innovations into the Act, including a private right of action for consumers, § 1692k, and a civil liability standard that does not turn on the violator's intent, § 1692k(a). It makes little sense to suppose that Congress would have diluted the enhanced

protections it sought to provide to vulnerable consumers by expecting them to exhibit greater sophistication to see through deception.

CONCLUSION

The Court should hold that collections special counsel are debt collectors under the FDCPA and that the letters Respondents received violate § 1692e(9) & (14).

Respectfully submitted,

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The Code of Laws of the United States of America

Title 1- General Provisions

This title was enacted by act July 30, 1947, ch. 388, § 1, 61 Stat. 633

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

...

"officer" includes any person authorized by law to perform the duties of the office;

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3)[1] of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

(Pub. L. 90-321, title VIII, § 806, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 877.)

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[1] See References in Text note below.

REFERENCES IN TEXT

Section 1681b(3) of this title, referred to in par. (3), was redesignated section 1681b(a)(3) of this title by Pub. L. 104-208, div. A, title II, § 2403(a)(1), Sept. 30, 1996, 110 Stat. 3009-430.

TITLE 15 – COMMERCE AND TRADE

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principle obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

(Pub. L. 90-321, title VIII, § 808, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 879.)